Editor's note: Reconsideration denied -- Order dated Aug. 10, 1984
Editor's note: aff'd sub nom. Getty Oil Co. v. Hodel, Civ.No. 84-320 (D.Wyo. July 18, 1985, 614 F.Supp 904); aff'd sub nom. Texaco Producing v. Hodel, No. 85-2338 (10th Cir. March 11, 1988) 840 F.2d 776

SIERRA CLUB ET AL.
(ON JUDICIAL REMAND)

IBLA 82-934 Decided May 2, 1984

Remand to the Board by the United States District Court for the District of Wyoming, reinstating the appeal by the several appellants from the decision of the District Supervisor for Oil and Gas, Minerals Management Service, Rock Springs, Wyoming, approving Getty Oil Company's application for a permit to drill on lease W-20472.

Vacated and remanded.

1. Environmental Quality: Environmental Statements-- National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Generally --Oil and Gas Leases: Suspensions--Wilderness Act

   Where application is made for suspension of unitized oil and gas leases in order to preserve them from expiration pending approval of an application for permission to drill, and where the suspension is granted at the discretion of the authorized officer on condition that permission to drill may be denied upon a finding that drilling operations would result in unacceptable impacts on the wilderness characteristics of the area, an environmental impact statement on the effects of such drilling which fails to consider the alternative of refusing permission to drill is an inadequate basis for a decision to permit drilling.

Appearances: Karin P. Sheldon, Esq., Denver, Colo., for Sierra Club Legal Defense Fund Inc.; Robert P. Schuster, Esq. and Henry C. Phibbs, II, Esq., Jackson, Wyo., for Jackson Hole Alliance for Responsible Planning; A. G. McClintock, Attorney General, Steve Jones, Assistant Attorney General, and Jennifer Hager, Esq., Cheyenne, Wyo., for the State of Wyoming and Ed Herschler, Governor of Wyoming; appellants; Jerome C. Muys, Esq., Susan L. Smith, Esq., John F. Shepherd, Esq., Washington, D.C., and John F. Sullivan, Esq., Tulsa, Oklahoma, for Getty Oil Co.; Marla E. Mansfield, Esq., Department counsel, Denver, Colo., for the Bureau of Land Management; respondents.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Background of the Case

An application for a permit to drill (APD) an exploratory oil and gas well was filed with the Geological Survey by Reserve Oil Company (hereinafter "Getty"), operator of the Bear Thrust leasing unit. 1/ Our review here is limited to that particular APD. 2/ The drill site applied for is in section 8, T. 39 N., R. 114 W., 6th principal meridian, Teton County, Wyoming. The Bear Thrust Unit is comprised of 25 leases, and embraces some 24,900 acres in the Teton Division of the Bridger-Teton National Forest, about 15 miles from the town of Jackson, Wyoming. The specific site of the proposed drill pad is a high mountain divide, or "saddle," on lease W-20472, issued effective October 1, 1969. It is in the drainage area of Little Granite Creek. The unit occupies land affected by the special oil and gas development conditions imposed by former Secretary of the Interior Krug's memorandum of August 5, 1947 (the "Krug Memorandum").

Almost the entire Bear Thrust Unit, including the drill site, lies within the recommended Gros Ventre Wilderness. The area was not recommended for wilderness designation in the RARE I program conducted by the Forest Service (FS), but was added in RARE II by decision dated April 16, 1979. However, certain references in the file indicate that it was deleted from the bill now pending in Congress for wilderness designation by the Wyoming delegation. In any event, the pending wilderness bill excludes these lands.

As noted, lease W-20472 issued effective October 1, 1969. It was unitized into the Bear Thrust Unit on September 19, 1979. On September 24, 1979, within days of the expiration of the primary term of the lease, the unit operator (with advance permission of GS) filed a "skeleton" APD.

1/ Due to reorganization within the Department of the Interior ("Interior"), the function of the Geological Survey ("GS") in this regard was subsequently assumed by the Minerals Management Service ("MMS"), and later transferred to the Bureau of Land Management ("BLM"). Further, Reserve Oil Company, the original applicant, was acquired by Getty Oil Company, which in turn has been acquired by Texaco. However, as it appears that Getty Oil Company has retained its corporate identity as the applicant, all references in the text will refer henceforth to "Getty," rather than to Reserve or Texaco.

2/ Slightly prior to that filing, another such APD had been filed by National Cooperative Refinery Association for an exploratory well in the Cache Creek Unit. The two adjacent leasing units are in the Bridger-Teton National Forest. Because of certain common concerns, a single environmental impact statement was prepared covering both APDs. Prior to any decisive action by the Federal agencies concerned, the APD for the Cache Creek Unit was withdrawn by the applicant. This is significant because, in consequence, literally thousands of pages of the record now before us relate to the Cache Creek application and, although immaterial in most part to our review, are liberally intermingled with documents relating to the Bear Thrust Unit, with which we are concerned. However, the handling of the Cache Creek APD has certain legal implications, discussed infra, which bear upon our disposition of this appeal.

Perceiving that an extensive environmental review would be required prior to acting on the APD, GS then suspended the lease and all other leases due to expire in the Bear Thrust Unit at the behest of those lessees. This collective suspension was granted pursuant to 43 CFR 3103.3-8 "in the interests of conservation" on May 30, 1980, with retroactive effect from September 1, 1979. The lease suspension document, signed by C. J. Curtis, GS Area oil and Gas Supervisor, included a provision for automatic termination of the suspension in the event of a "decision not to approve any oil and gas drilling operations within the Bear Thrust Unit area on the basis of a determination that such operations would result in unacceptable impacts on the wilderness characteristics of the area * * *." Neither the lessees nor the unit operator expressed any concern regarding the implication in the foregoing that the Government could disapprove any drilling operations within the Bear Thrust Unit area. Subsequently, the operator did request and receive a modification of language concerning the time for commencement of drilling operations after approval.

Presented with contemporaneous APDs for the Little Granite Creek area and the Cache Creek area (see fn. 2), and recognizing the environmental sensitivity of both areas, the governmental agencies concerned determined that a decision should be based upon a single environmental impact statement (EIS) accomplished pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1976). Because the Interior agencies (GS, later MMS, and BLM) were responsible for the mineral estate, while FS (of the Department of Agriculture) was responsible for management of the surface estate, it was decided that the single Cache Creek/Bear Thrust EIS would be produced by FS and GS jointly, utilizing studies by interdisciplinary teams comprised of personnel from both agencies. The decision to so proceed was formalized by an inter-agency memorandum of understanding which specified the basic ground rules.

A question shortly arose concerning whether, and to what extent, the participants in the study could consider a "no action alternative," i.e., a total refusal to permit drilling operations on the subject lands. In an effort to resolve this issue so that the EIS could proceed properly, the Interior task force leader posed the question to Interior's Regional Solicitor in Denver. The reply, by Acting Regional Solicitor Lowell Madsen (henceforth "the Madsen opinion"), dated October 10, 1980, advised, in effect, that upon the lease terms and added stipulations which condition these particular leases, the Secretary of the Interior could not foreclose or prohibit drilling operations thereon without incurring liability, although such operations were subject to reasonable restraint and control by the Secretary for the purposes of protecting environmental values. The opinion characterizes the lessees right to drill as "inviolable" and "basic." It suggests that the unauthorized refusal to grant any APDs, or the indefinite suspension of the right of enjoyment of the leases, would give rise to causes of action by the lessees for breach of contract, injunctive relief, or inverse condemnation.

The Madsen opinion was referred by FS to its own counsel for review. The response, in the form of a memo dated December 1, 1980, by Dean A. Gardner, takes issue with the Madsen opinion's conclusion that the several "no action" alternatives are not available in this instance merely because they were not within the lawful authority of the respective cabinet officers.

It is not apparent from the record how the differing views in the Madsen opinion and the Gardner opinion were reconciled. Nevertheless, they were apparently resolved in favor of the Madsen opinion, as both GS and FS proceeded to conduct the EIS in the mutual understanding that the Madsen opinion was the proper legal analysis of their lack of authority to consider a blanket denial of the APDs.

Upon completion of the EIS, Robert Chase, on behalf of the District Supervisor for Oil and Gas, MMS, executed a "Record of Decision" dated May 14, 1982. This document is a summary of the conclusions and decisions which had been reached on the basis of the EIS. It noted that Getty had been granted approval to drill at a site relocated 600 feet northeast of the original location designated in the APD, using road access via Little Granite Creek. It further alluded to the alternatives addressed in the EIS and recited a list of conditions for monitoring and mitigating damage to the various specific environmental values. It also required approval of a separate road design package using FS "roading guidelines."

The APD had been approved that same day, also by Robert Chase, and transmitted to Getty. However, approval of the access road by the Regional Forester, FS, was deferred for several months thereafter.

The parties to the instant appeal, and certain others, filed administrative appeals to the Director, MMS, to this Board, and to the Chief of the Forest Service. Appellant Herschler, in his capacity as Governor of the State of Wyoming, had written a letter to then Secretary of the Interior Watt, requesting that he intervene and deny approval of Getty's drilling proposal. On June 9, 1982, while the appeal was pending before this Board, Acting Secretary Hodel replied to Governor Herschler's letter, indicating his approval of the May 14, 1982, decision of MMS. A copy of Acting Secretary Hodel's letter was routed to this Board, where it was regarded as an official expression of approval of the MMS decision by the Acting Secretary. Believing that the Acting Secretary's letter had exhausted the administrative remedy and was final for the Department, the Board dismissed the appeal.

However, the action by Acting Secretary Hodel could not, and did not, resolve the administrative appeals in the Department of Agriculture, then pending before the Chief, FS, in which all parties to the instant appeal were participants, except BLM.

The Chief's decision on those appeals was issued October 25, 1983. Therein, appellants sought review of "[t]he Regional Forester's decision to approve road access for Getty lease W-20472 on the Bridger-Teton National Forest." In asserting its jurisdiction on this issue the Chief's decision states, on page 2, the following:

> Getty Oil contends that the decision of MMS to approve the APD with road access is within the jurisdiction of the MMS (now BLM), and not the Forest Service.
>
> As we stated in our letters granting the partial stay, the Secretary of the Interior has the statutory jurisdiction for the administration of the Mineral Leasing Act of 1920 and its

> implementing regulations. Therefore, issues raised about the validity of the APD must be directed to the Department of the Interior, and not in an administrative appeal before an agency of the Department of Agriculture.
>
> The Office of the Solicitor, U.S. Department of the Interior (USDI), has advised the Department of Agriculture that USDI has completed all administrative actions regarding its approval of the Little Granite Creek APD. This approval is now subject to judicial proceedings where questions about the legal basis of the approval can be raised and resolved. Therefore, we are reviewing the record of this appeal on the basis that Getty has an APD approved by USDI. Access across National Forest System lands whether by road or other means is within the jurisdiction of the Forest Service.

In conclusion, the Chief's decision stated:

> Based on the merits of issues raised by the appellants as reviewed and discussed above, we are upholding the Regional Forester's decision to approve road access to the Getty wellsite.

By his letter of October 26, 1983, John B. Crowell, Jr., Assistant Secretary of Agriculture for National Resources and Environment, advised the Chief, FS, "I will not review these decisions; therefore, this constitutes the final administrative determination on these cases."

Our several appellants filed three suits in the United States District Court for the District of Wyoming seeking judicial review of the decision of the Department of the Interior. Those suits apparently have been consolidated by the Court and styled Jackson Hole Alliance, et al. v. Watt, et al., Civ. Nos. 82-409, 82-411, and 82-412.

By order dated February 9, 1984, the Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, held that the letter of July 7, 1982, from then Acting Secretary Hodel to the Governor of Wyoming did not constitute a final decision by the Department of the Interior, vacated this Board's order of July 22, 1982, dismissing the appeal, and remanded the matter to the Board with instructions to disregard the Hodel letter and to review the decision of Robert Chase, the MMS District Supervisor. The Court further imposed a time limit for the accomplishment of this review and the rendition of a final decision. Because of the time constraint, this Board ordered the simultaneous filing of briefs by all participants.

Issues Presented By Appellants

1. The "skeleton" APD was incomplete when filed and was untimely, as was the request for lease suspension, both being filed only a few days prior to the expiration of lease W-20472. Thus, the applicant was not entitled to favorable consideration, and both the APD and the suspension request should have been denied.

2. The EIS is legally inadequate, as it was "skewed" improperly in favor of a drilling program because it erroneously either failed to consider or gave inadequate consideration to the several "no action" alternatives by which any lease development on the Getty unit could have been precluded. These include:

a. Outright denial of this, or any, APD in the Bear Thrust Unit because of its environmental sensitivity, based upon (i) the terms of the lease; as conditioned by the several specific stipulations appended thereto; (ii) the terms of the order granting suspension of the leases, and (iii) the broad authority of the Secretary to do "all things necessary" to carry out the purposes of the Mineral Leasing Act of 1920, and under the National Environmental Policy Act, as well as his general power to manage the public land and protect the environment.

b. Indefinite suspension of all leases in the Bear Thrust Unit pending (i) a possible exchange of those leases for federal oil and gas leases elsewhere; (ii) an effort by the Secretary to seek legislative authority to cancel the leases; (iii) withdrawal of the lands from the operation of the mineral leasing laws; (iv) approval by the Congress of the Gros Ventre Wilderness proposal; (v) the availability of better seismic data; (vi) the drilling of another prospect to test the structure from outside the recommended wilderness area; (vii) directional drilling from outside the area.

The failure to consider certain of these "no action" alternatives, and the alleged inadequacy of the consideration devoted to the others, is attributed to the reliance of the EIS task force on the "Madsen opinion," which asserted, in effect, that the operator had a right to develop the lease, and that it was not within the legal authority of the Secretary to prevent the exercise of that right. Appellants, therefore, have devoted substantial portions of their respective briefs to demonstrate that the Madsen opinion is an incorrect analysis of applicable law.

3. The record which was compiled as the basis for the EIS, and the EIS itself, do not support the decision to approve road access to the drill site in preference to the alternative of helicopter mobilized drilling.

4. The EIS does not accurately describe the existing environment of the Little Granite Creek drainage, and inadequately assesses the consequences of the contemplated activities.

5. The EIS is inadequate by reason of its failure to assess the environmental impact of full field development of the unit in the event the exploratory well is successfully completed as a producer. Other potential drill sites and access roads were not located and studied for their additional environmental impact, nor were the socio-economic impacts of such potential full field development addressed.

6. Authorization to drill on leases which are subject to the "Jackson Hole Area Oil and Gas Lease Stipulation" can only be granted by the Secretary of the Interior personally, and not by an authorized representative of the Secretary.

7. There has been no requirement imposed upon Getty by the Department of the Interior to ensure Getty's compliance with Wyoming statutes and regulatory standards pertaining to road construction, oil and gas production, water appropriation, and environmental protection.

Decision

The Board has reviewed the record concerning all of these issues, but has identified one specific issue which controls our result.

In requesting the Regional Solicitor's opinion, the Interior Department's task force leader was charged with the preparation of a single EIS for both the Cache Creek Unit and the Bear Thrust Unit. The Madsen opinion, which was submitted in response to that request, addressed the status of leases in both units. While we find ourselves in accord with most of the legal analysis recited in the Madsen opinion, we are obliged to conclude that it reached an erroneous conclusion because it failed to consider the language and the source of the terms under which the several lease suspensions were granted. Moreover, while all of the appellants and respondents have alluded to the "disapproval provisions" in the lease suspension orders, none of them correctly identified their source, or the significance of the source.

The critical language in each of the Bear Thrust lease suspensions is as follows:

> The suspensions are for an indefinite period of time, subject to automatic termination on the first of the month in which (1) the lessees and unit operator are notified in writing of the decision not to approve any oil and gas drilling operations within the Bear Thrust unit area on the basis of a determination that such operations would result in unacceptable impacts on the wilderness characteristics of the area, or (2) actual approved drilling operations are commenced should it be decided to permit the drilling of the well. It is further understood that should drilling be permitted and the unit operator or lessees do not commence actual drilling operations within 30 days following receipt of all necessary approvals and permits, the suspensions will terminate on the first of the month in which said 30 day period expires. [Emphasis added.]

The language underscored above evinces a clear contemplation that the Department of the Interior reserved the authority to decide not to approve any drilling operations based upon a finding of "unacceptable impacts on the wilderness characteristics of the area."

The several appellants argue forcefully that the imposition of this condition of the suspension was within the authority of the Department of the Interior because the allowance of the requested suspensions was discretionary, and could have been denied outright. Therefore, say appellants, Interior had a right to qualify its approval of the suspensions in this manner. Appellants note that the Madsen opinion did not consider the effect of this condition, and that its author may not have been aware of it. Appellants Herschler and the State of Wyoming argue that "Getty may have had an 'unconditional' right

to drill until September 30, 1979 [the lease expiration date], but that right, if it ever was there, got bargained away in exchange for the granting of a lease suspension." Further, appellants point to the fact that Getty made no objection, protest, or appeal from the imposition of this particular provision, although it did file an objection to the time limit imposed by the second proviso, supra, contending that 30 days after full approval of the APD was an inadequate period within which to commence actual drilling operations. (MMS agreed, and this proviso was modified accordingly.) Appellants contend that Getty's silence with regard to the first proviso, while objecting to and seeking adjustment of the second proviso, constitutes an acceptance by Getty of the condition imposed by the first proviso.

Getty argues that the granting of the suspension of lease W-20472 was not discretionary, but mandatory, citing Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981). It asserts that a request was filed on August 14, 1979, for a "Preliminary Environmental Review [for] (Permission to Stake)" the proposed test well site in the Bear Thrust Unit, and that permission to stake was denied by GS upon the recommendation of FS, pending consultation on the proposed wilderness area, thereby precluding the possibility of development of the lease prior to its scheduled expiration. Therefore, says Getty, the allowance of the suspension was obligatory, and the Department could not lawfully use the suspension instrument as a vehicle to qualify or diminish the right of full enjoyment to which the lessee was entitled under the lease terms. Getty adds (significantly), "Even if the Secretary possessed such authority, he had not delegated it to the USGS Area Oil and Gas Supervisor. (See 30 CFR Part 221 (1979))."

BLM argues (as does Getty) that there was no intention to modify the leases by the terms of the suspension. Indeed, the affidavit of C. J. Curtis (Area Oil and Gas Supervisor, who signed the letter notifying Getty of the approval of the lease suspension on these terms) declares that it was not his intention to modify the underlying leases or the Bear Thrust Unit agreement. BLM states:

> The above-quoted sentence was taken from page 2 of May 2, 1980 memorandum from the Chief, Conservation Division, to the Director of the USGS, which memorandum was approved by the Director on May 7, 1980. A copy of that memorandum is attached as exhibit C. Mr. Curtis refers to this memorandum as authority for granting a suspension of operations for the leases in the Bear Thrust Unit. 3/
>
> We have been advised that the Chief's May 2, 1980 memorandum was not cleared for legal sufficiency by the Solicitor's Office. [Footnote omitted.]

BLM Brief at 12.

The above-referenced May 2, 1980, memo to the Director, GS, relates the history of the subject Bear Thrust Unit leases and the environmental concerns attendant to that unit and the adjacent Cache Creek Unit "and the general area," and states:

3/ Other lessees joined the unit after it was approved, some as late as 1981.

> [I]n view of these circumstances, we believe that suspension of the operating and producing requirements of the subject leases would be appropriate. Such an action would be consistent with the decisions made in earlier, similar cases and would not be in conflict with the memorandum opinion of the Assistant Solicitor for Minerals dated July 14, 1975.
>
> If you concur with the foregoing, it is recommended that by your approval hereof you assent to the requested suspensions and authorize the Area Oil and Gas Supervisor, Casper, Wyoming, to grant the suspensions effective as of the first of the month in which the applications were filed, i.e., September 1, 1979, for leases W-20439, -20472, -20555, -20556, and -20647-A and January 1, 1980, for lease W-20467. The suspensions so granted would be for an indefinite period of time that would terminate automatically on the first of the month in which (1) the lessees and unit operator are notified in writing of the decision not to approve any oil and gas drilling operations within the Bear Thrust unit area on the basis of a determination that such operations would result in unacceptable impacts on the wilderness characteristics of the area, or (2) * * *.
>
> In addition, your authority is requested for the Area Oil and Gas Supervisor, Casper, Wyoming, to grant a suspension, subject to the same conditions set forth in the preceding paragraph, for any other Federal lease committed to the Bear Thrust unit agreement so long as present circumstances prevail and upon receipt of a valid application.

The Director, GS, signified his approval and authorization to proceed on the stated basis by applying his signature to the memo on May 7, 1980.

Two cogent aspects of the matter are revealed by the language quoted from the memorandum. First, it is readily apparent that its author, the Chief of the Conservation Division, as well as the Director, as signified by his approval, believed that the proposed suspension was purely discretionary, not mandatory. Second, it is clear the Director's authorization to Area Oil and Gas Supervisor Curtis to allow the suspension was limited to the "conditions set forth" in the memo. Thus, it is irrelevant what Curtis intended. He was required to include those conditions. Since he did not originate the language, but was obliged to include it, it does not matter what he thought it meant.

The basis for providing for the possibility of a decision not to approve oil and gas drilling is found in documents F-000002 through F-000021 of the administrative record provided this Board by the District Court. These include a memorandum dated October 16, 1978, from the Acting Director, GS, to the Secretary of the Interior, routed through the Assistant Secretary, Energy and Minerals, and through the Department's Solicitor. This memo describes the delays in drilling an exploratory well on the Cache Creek Unit due to environmental concerns, and the impending expiration of certain of the leases within that unit, and requests the Secretary to authorize the Area Oil and Gas Supervisor to grant suspensions for an indefinite period of time. The memo then states:

> [T]his authorization is made with the understanding: (1) that if the decision is made not to approve the drilling of the Cache Creek Unit well No. 1 on the basis of the EIS, the suspension shall terminate effective on the first of the month in which the permit application is rejected; and (2) that if the decision is made to approve the drilling of the well, the suspension will terminate effective either (a) on the first day of April of the calendar year following the calendar year in which the permit to drill Cache Creek Unit well No. 1 is issued, or (b) on the first day of the month in which the operator commences actual operations under the permit, whichever is earlier.

The proposal was personally approved by then Secretary Cecil D. Andrus, who signed it on November 7, 1978. The memo had earlier been read and approved by Solicitor Krulitz and Assistant Secretary Davenport, as indicated by their initials on the Secretary's copy.

While not absolutely compelling, this document is significant in a number of respects. It reflects the personal views of the Secretary, the Assistant Secretary, and the Solicitor (the chief legal advisor of the Department) that a denial of the Cache Creek APD on the basis of the EIS was a distinct possibility for which provision could be made. It is also apparent that Acting Regional Solicitor Madsen, when he prepared his opinion on the possibility of "no action alternatives" in the Cache Creek-Bear Thrust EIS, must not have been aware that the option to disapprove the Cache Creek APD had been reserved by the Secretary with the knowledge and approval of the Solicitor, and that a similar disapproval provision had been ordered by the Director, GS, to be incorporated in the Bear Thrust lease suspension. Had he been aware that these officials had expressly provided in the lease suspension orders for contingent disapproval of the APDs on the basis of the results of the EIS, it is hardly likely that he would have, in effect, overruled their actions by writing, "If as a result of the EIS in preparation, the pending applications for drilling permits are denied, the Secretary will have exceeded his authority * * *." (Madsen op., p.2). While the opinion does note that the Secretary had "agreed to a suspension of operations and production on these leases on November 7, 1978, pending action on the application" (Madsen op., p.1), there is nothing to indicate that its author was aware that the Secretary had conditioned his approval of the suspension to allow for potential disapproval of the APD on the basis of the EIS. We must conclude, therefore, that the Madsen opinion was deficient in this respect.

The question, not addressed in the Madsen opinion, of whether the terms of the suspension orders were legally imposed, is germane to our review of the matter. The answer is rooted in the determination of whether allowance of the lease suspensions was discretionary or obligatory as a mandate of law. If discretionary, i.e., if the Secretary or his authorized officer could reasonably elect to refuse to grant the suspensions and allow the leases to expire without violating the legal rights of the lessees or the unit operators, then they had the election, in the reasonable exercise of their discretion, to condition their allowance of the requested suspensions as they did. If, on the other hand, they were bound as a matter of law to suspend and continue the leases in effect, such suspension could not be employed as a device to preclude or curtail whatever rights of enjoyment the lessees were entitled to under the leases as issued.

The Board believes that this determination can only be made on a case-by-case basis through the evidentiary attribution of fault for the delay. In short, who is to blame for the fact that the lease has not been developed or production achieved within its primary or extended term? The section which amended the Mineral Leasing Act to provide for the granting of lease suspensions, 30 U.S.C. § 209 (1976), was intended by the Congress to afford relief based upon equity. As noted by the Court of Appeals for the D.C. Circuit in Copper Valley Machine Works, Inc. v. Andrus, supra, 653 F.2d at 603:

> [t]he [legislative] history is consistent with the statute's use of the word "suspension" in its unqualified sense: "The very purpose of the bill is to give some equitable consideration to the many leases where the Department of the Interior, by its order, has prohibited production of oil from the leases." 76 Cong. Rec. 705 (1932) (remarks of Representative Eaton). It was further explained: "It seems unfair for the Government to order lessees to refrain from production and then collect rent for the non-production period." Id. at 1881 (1932) (remarks of Representative Eaton). Precisely the same rationale underlay the decision to extend leases for the period of the suspension. H.R. Rep. No. 1737, 72d Cong., 1st Sess. 3 (1932).

In the Copper Valley case, the lessee had earned a two-year lease extension by engaging in drilling at the expiration of the primary term of the lease. However, because the Secretary had ordered a cessation of operations in the area for a period of six months of every year in the interest of conservation of the fragile tundra environment, the lessee was left with insufficient time to complete a well physically and mechanically capable of production in paying quantities prior to the expiration of the extended term. The Court held, in effect, that the Secretary's order interdicting the lessee's operations had operated to deprive the lessee of its enjoyment of the lease for its full term, and was in fact a suspension imposed by the Secretary which required a concomitant extension of the lease.

In Copper Valley, the Department had asserted that the granting of a suspension upon application by the lessee is discretionary where the lessee has been dilatory. The Court found that argument irrelevant in the circumstances of that case, saying:

> The Secretary argues in the alternative that notwithstanding the terms of § 209, "that section gives the Secretary discretion not to invoke a suspension." Appellee's Brief at 16. It is in this context that the Secretary emphasizes the second reason given for the denial of extension: Copper Valley had had sufficient time to drill several wells in the area under lease.
>
> This position rests upon a misconception of Copper Valley's request for an extension. The Secretary treated the January 20, 1978 letter as an "application by [a lessee] for relief from the producing requirements or from all operating and producing requirements of [its lease]." 43 C.F.R. § 3103.3-8(a), note 4 supra. However, Copper Valley has never applied for relief from any producing requirements within the meaning of the regulation.

> Although some language in the regulation might be construed to favor the Secretary's construction, it is clear that the regulation, when read in its entirety, aims at situations where lessees make applications for suspension of operations or production or both * * *. 43 C.F.R. § 3103.3-8(a). Here, by contrast, the suspension was not applied for and obtained by the lessee but was ordered by the Secretary. This is not a case where the Secretary was asked to invoke a retroactive suspension, but one where he was asked to recognize that a suspension has been invoked by his action. Whatever relevance dilatory drilling may have when the lessee asks for a suspension, it is not a relevant consideration where the suspension has already been directed by the Secretary.

653 F.2d at 604.

This Department has long held that where a lessee makes application for a lease suspension the Secretary (or his delegate) is under no obligation to suspend; he may do so in his informed discretion after making the necessary finding that a suspension is in the interest of conservation. Jones-O'Brien, 85 I.D. 89, 91 (1978).

In U.S. Oil and Development Corporation, A-26269 (Oct. 30, 1951), the Acting Assistant Secretary of the Interior stated:

> I deem it unnecessary to decide in the present case whether the Secretary of the Interior, in the exercise of his authority under the "assent" portion of section 39, might give retroactive effect to such action by assenting to the suspension of operations and productions during a period antedating the Secretary's action. Assuming that such relief can be granted retroactively, I believe that, since the granting of relief under the "assent" provision is a matter of grace, this authority should be exercised only for the benefit of lessees who have exercised reasonable diligence to obtain such relief.

The circumstances of the lease suspensions in the Bear Thrust Unit provide a clear example of discretionary relief. The chronology is as follows:

The unit agreement is dated June 29, 1979, but its ratification and joinder by the various lessees continued during July, August and early September 1979. Northwest Exploration Company, lessee of W-20472, committed that lease to the unit on July 19, 1979. As previously noted, that lease was due to expire on September 30, 1979. The request for permission to stake the drillsite was filed on August 14, 1979, at which time the unit had not been fully joined by the other lessees nor approved by the Department, and no APD or request for suspension had yet been filed. The last lessees to commit to the unit prior to its approval signed their ratification and joinder instruments on September 5, 1979. 3/ GS approved the unit agreement on September 19, 1979. The "skeleton" APD and the request for suspension were not filed until September 24, 1979, at which time only six more days remained

3/ Other lessees joined the unit after it was approved, some as late as1 1981.

in the primary term of lease W-20472, of which two were week-end days. Even assuming that the drill site had been staked, and that a complete APD had been filed, and had been approved by GS on the next day, September 25, 1979, only five more days would have remained. Disregarding all other considerations, including environmental concerns, it is inconceivable that the operator could have secured a water source and installed a delivery system, prepared the drill pad, delivered and installed a drilling rig, and been engaged in diligent drilling at midnight on September 30. There was no road to the site, and the FS had not approved any form of access, nor, apparently, had any request for access been submitted at that time. Road construction alone would have required more time than was available, and the dramatic demonstration of the difficulties of helicopter mobilization described by the EIS would have precluded timely compliance by that method, even if approval had been given instanter.

The hard reality was that no complete APD had been submitted, no access was available, the water source problem was unresolved, there were known environmental concerns which had to be addressed, and there was no possibility that the unit operator could be diligently engaged in drilling on the lease before it expired. The only possible salvation of the situation lay in the hope that a lease suspension would be granted.

The APD should have been filed with GS at least 30 days in advance of the contemplated starting date for drilling as provided in Notice To Lessees (NTL)-6, 41 FR 18116 (April 30, 1976), of which the unit operator had actual notice. NTL-6 incorporates a "warning" that a late filing will not automatically receive priority handling to the detriment of timely filed applications. It further advises that even "[t]he early filing of a complete application is no guarantee that approval thereof will be granted within the 30-day period, as environmental considerations * * * may result in more than 30-day delay." (Emphasis added). NTL-6 also states, "A higher priority due to an emergency, such as an imminent lease expiration date, will be duly considered but no special consideration will be given simply because a late filing is made."

In the case of the Bear Thrust APD, the unit operator could hardly have acted more expeditiously because the unit had not been approved by GS until only four days before. However, this was not attributable to any delay on the part of GS, which had acted very promptly on the matter. The fault lay in the fact that the organization of the unit was begun too late in the lease term and took too long to accomplish.

The approval of the requested lease suspension, on the condition recited above, was authorized by the Director, GS, on the representation of the Chief, Conservation Division, that the permission to stake the drillsite had been temporarily denied because of environmental and wilderness considerations. 4/ But, as shown, the staking request was filed before even the "skeleton" APD, and before approval of the unit. The "Krug Memorandum" limited drilling in this area to leases in approved units. Thus, even the

4/ Permission to survey and stake the drill site was granted a month after it was originally denied, whereupon Getty proceeded to accomplish it.

staking request was premature. Regardless of that action, the denial of the staking request was neither the proximate cause, nor even a remote cause, of the unit operator's inability to commence drilling on W-20472 prior to its expiration, because even had staking been permitted, it would still have been virtually impossible to meet the deadline in the ordinary course of events.

We conclude that the operator's inability to commence drilling before the lease expired can not be attributed to any order, action, omission, or delay by any Federal agency. Cf. Copper Valley Machine Works, Inc. v. Andrus, supra. Therefore, the operator and the lessees were not entitled as a matter of right to have the leases suspended. In acting on the suspension request, the Director, GS, had the discretionary authority to deny it or to approve it on any reasonable conditions he deemed necessary or desirable in the interest of conservation. "Conservation," as used in the Mineral Leasing Act at 30 U.S.C. § 209, "is to be given its ordinary meaning and includes prevention of environmental damage." Copper Valley Machine Works, Inc. v. Andrus, supra, at 600.

We hold, therefore, that disapproval of the Bear Thrust APD "on a determination that such operations would result in unacceptable impacts on the wilderness characteristics of the area" was legally within the purview of the grant of suspension, at least as to those leases suspended thereby, and that the failure of the EIS to address this particular "no action alternative" was error.

Correlative Findings and Conclusions

For purposes of implementing this decision we make the following additional findings and conclusions:

1. The Other "No Action" Alternatives Were Properly Eliminated From Consideration In The EIS.

A. The Board concurs in the finding of the Madsen opinion that the leases and the rights of the lessees are not so strictured by the Krug Memorandum, the "Jackson Hole stipulation," or any of the other standard or special stipulations as to provide a basis for outright denial of any right to drill anywhere on the leasehold. Indeed, as pointed out in the brief of Getty (at pp. 24-27), the stipulations are so worded as to constitute a recognition of the lessee's right to drill, and are subordinate in their application to such right, employing such language as "as far as possible consistent with the authorized use," and "the least possible disturbance to wildlife."

B. The broad, general authority of the Secretary to manage the public lands and mineral resources and to protect the environment does not, under any statute or inherent power of office, cloak him with authority to divest Constitutionally protected property rights, and it should be unnecessary for this Board to have to say so.

C. Various other alternatives proposed by the Sierra Club brief (pp. 22, 23) are so totally impossible of accomplishment, either legally or physically, or so ineffective in result, as to warrant summary rejection as frivolous. These include:

-- directional drilling from outside the area [presumably several miles away];

-- withdrawal of the lands from the mineral leasing laws;

-- suspension of the leases pending the drilling of another prospect well to test the structure from outside the recommended wilderness area.

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2. The Alternatives Involving Congressional Authorization To Condemn Or Exchange The Leases Were Adequately Considered and Properly Rejected.

A. Condemnation -- The prospect of securing passage of such legislation and appropriation of funds for that purpose is remote; the assessment of the respective values of the many parties in interest and the taking as a whole would be nearly impossible; the geologic inferences are such that the cost would be very high; that litigation of values would surely be required; all these combine so as to make any attempt by the authors of the EIS to analyze and report on it no more than an indulgence in unfounded conjecture.

B. Exchange of Leases -- Again, authority to compel the lessees to accept this alternative and to empower the Secretary to implement it would have to come from the Congress and the President in the form of enacted law. No one has suggested any unleased lands of equivalent size, geology and potential which might be made available, or how they might be discovered. Litigation by some or all of the many interested parties would be a virtual certainty, with unknown results.

The Board agrees with the contentions advanced in the briefs submitted by BLM and Getty that the requirement to discuss alternatives in an EIS is subject to "a rule of reason;" Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1074 (1st Cir. 1980); that such an alternative must afford "some notion of feasibility" to warrant consideration; Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978); that there must be "information sufficient to permit a reasoned choice of alternatives;" NRDC v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972); and that remote or speculative alternatives need not be considered; Sierra Club v. Stamm, 507 F.2d 788, 793-94 (10th Cir. 1974); NRDC v. Morton, supra, at 837. The discussion of alternatives in an EIS need not be exhaustive where they present obvious disadvantages. If all reasonable alternatives to the project have been considered, it is sufficient, "even if some were only briefly alluded to or mentioned." Ventling v. Bergland, 479 F. Supp. 174, 181 (D.S.D. 1979), aff'd, 615 F.2d 1365 (8th Cir. 1979), quoting Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50, 57 (N.D. Cal. 1972), aff'd, 487 F.2d 814 (9th Cir. 1973).

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3. The EIS And The Record Compiled In Its Preparation Provide An Accurate And Professional Analysis Of The Existing Environment In The Area And The Effect That Implementation Of The Proposal

Would Have On That Environment And On The Specific Resource And Wilderness Values Identified.

A. Appropriate measures for monitoring and mitigation of impacts are provided, as are requirements for rehabilitation. The interdisciplinary team studies are not "skewed" by the misconception that a "no action" alternative was unavailable but, rather, they were enhanced thereby, as that misconception provided the motivation for a study based on the assumption that the proposal would be implemented and the impacts would actually accrue, and would require maximum mitigation and rehabilitation. The Board finds that the only inadequacy in the EIS lies in its failure to consider properly the "no action" alternative. The balance of the EIS is unimpaired and need only be supplemented to afford a proper basis for decision.

B. The Board further finds that the professional disagreement by various non-federal witnesses with the findings and conclusions reached by the federal personnel charged with responsibility for the accomplishment of the EIS is insufficient to discredit that accomplishment. Differing viewpoints and analyses of the same problem are endemic among professionals of every academic discipline, and if each were permitted to discredit the work of his or her colleague, nothing would ever be achieved. Those who participated in the preparation of the EIS were, without exception, well qualified to perform their respective assignments, and there is nothing to suggest any absence of good faith or diligent effort in their performance.

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4. Selection Of Road Access Over Helicopter Mobilization Was Proper.

If the new decision to be made in response to the Board's holding is to again approve the Bear Thrust APD, the Board finds that road access via Little Ganite Creek is the only feasible mode of access. The only rationally conceivable alternative, helicopter mobilization, has been fully demonstrated to be so impractical, dangerous, and perhaps futile, as to constitute a de facto denial of permission to drill. It must be remembered that the concern of NEPA is focused on the "human environment." The helicopter alternative poses a significantly greater risk to human life, health, and safety, as noted in the decision by the Chief, FS. Beyond the usual risk attendant to the flying of some 6,000 to 7,000 sorties at exceptional altitudes over rough terrain with very heavy loads in an area subject to severe climatic conditions, there is the added risk that helicopter evacuation of ill or injured personnel from the drill site could be prevented by adverse weather conditions for periods of up to 10 days.

The added cost of helicopter mobilization, estimated in 1981 to be from $2,300,000 to $2,800,000, while not a controlling concern, cannot be dismissed as the trivial amount it is asserted to be by appellants. It is a distinct disadvantage. Moreover, there is expressed concern in the feasibility study for cost overruns.

In addition, the utility of helicopter mobilization appears to be predicated on the assumption that the drilling will produce a dry hole. If the well is completed as a commercial producer, which is, after all, the object

of the whole exercise, then road access to the drillsite would be virtually essential. In that event, the use of the helicopter mobilization would have been worse than futile, in that the environmental impacts would have been compounded, the additional human risk for naught, and the added cost squandered.

When added to the other considerations, such as the dubious availability of the essential Chinook helicopter when needed, and the fact that helicopter mobilization has never been attempted anywhere at such an altitude, it is hardly surprising that its only advocates are those who would not have to undertake it and who would bear no responsibility for it. 5/

The Sierra Club's contention that the EIS is deficient because it failed to consider high lead mobilization as another alternative is rejected as frivolous.

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5. Selection Of The Drill Site Was Proper.

The drill site on lease W-20472, as relocated 600 feet to the northeast by the decision of Robert Chase, is at least as environmentally benign as any other potential drill site on the leasehold. The EIS concludes that there are no other environmentally preferable drill sites within the Bear Thrust Unit, and none has been identified by appellants.

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6. Complete Full Field Development Study Not Required At This Stage.

The EIS is not inadequate by reason of its failure to include a full-blown study and assessment of "full field development" of the unit in the event that the exploratory well is completed as a producer of commercial quantities of oil and/or gas. The prospect of full field development is addressed in the study to the extent necessary to consider the drilling of a single exploratory well on the unit, which is the objective of this EIS. The record indicates that the agencies intend that additional studies will be done prior to permitting expanded development.

5/ To the extent it has been argued that the "Jackson Hole stipulation" requires that helicopter access be selected over road access, we disagree. Such a construction is too restrictive. Even though a comparison in the EIS of the two methods of access reveals less environmental degradation from the former, that conclusion does not necessarily dictate the choice under the circumstances. Other factors such as cost, technical feasibility, safety, and the fact that road access might eventually be necessary were properly reviewed. Thus, although the EIS indicated that helicopter access might initially be somewhat more preferable from an environmental standpoint, we cannot find that FS was required by the stipulation to ignore other factors in selecting a method of access or that the choice violated the stipulation.

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7. The Unit Agreement Was Correctly Approved.

The contention by appellants that the Bear Thrust Unit Agreement was approved by an official who did not possess the requisite authority is time-barred, and improperly raised as an issue collateral to this appeal. Nevertheless, in the interest of disposing of all matters of contention, the Board finds this assertion to be without merit. A proper delegation of Secretarial authority in this regard had been vested in the official, as described in detail in the brief of Getty at p. 73.

8. The State Has No Concurrent Jurisdiction.

Appellant State of Wyoming argues that section 505 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1765 (1976), was not applied. This section requires, inter alia, that the terms and conditions of any right of way shall require compliance with applicable Federal and State law governing air and water quality standards, and "State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for similar purposes if those standards are more stringent than applicable Federal standards."

In considering this issue, the Board must first be concerned with its own limited jurisdiction. The Forest Service asserts exclusive jurisdiction over access routes through national forest lands outside lease or unit boundaries, and concurrent jurisdiction with BLM over such access within those boundaries. In this instance, the road design and construction must conform to FS standards, and receive FS approval. Moreover, these appellants have already concluded an appeal concerning the Little Granite Creek right of way in the Department of Agriculture, and received a decision which is administratively final for that Department. If the State of Wyoming pursued this issue to exhaustion in its appeal to the Chief, FS, we question whether it can be raised again collaterally before the Department of the Interior in this proceeding. Finally, we question whether FLPMA is even concerned here, or whether this right of way might instead be issued under the authority of the Forest Service Organic Act of June 4, 1897, 16 U.S.C. § 478 (1976), or other statutory authority administered by FS.

The Board afforded the participants in this proceeding the opportunity to brief the exhaustion issue, but the responses elicited were singularly unhelpful.

Further, the State of Wyoming has not asserted that its own standards "are more stringent than applicable Federal standards," nor has it identified any deficiency in the standards imposed.

If, after remand and readjudication based upon the supplemented EIS, the decision is made to again approve the Bear Thrust Unit APD, such decision should also identify the statutory authority under which the Little Granite Creek road access is also approved, and indicate the federal agency charged with primary administrative jurisdiction for approval and continuing supervision of the road. Should that agency be the Forest Service, the Board would expect the decision to be executed by an authorized officer of that agency.

The Board further observes, as dicta, that neither 43 U.S.C. § 1765, supra, nor the Mineral Leasing Act of 1920, as amended, operates to invest a State with concurrent jurisdiction of federal lands. However, where a right of way is granted pursuant to the FLPMA provision, BLM has an obligation to impose standards at least as stringent as those enforced by the State. See Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981); Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980).

Summary

The EIS, which was conducted in reliance on the Madsen opinion, failed to consider the "no action" alternative of disapproval of the APDs provided by the language which conditioned the granting of the lease suspensions in both the Cache Creek Unit and the Bear Thrust Unit. The granting of the suspensions in the Bear Thrust Unit was entirely discretionary, and the Director, GS, had full authority to impose a provision contemplating non-approval of drilling operations as a reasonable alternative for protection of the environment. The approval of the Cache Creek lease suspension on similar terms was the personal decision of the Secretary of the Interior, and is not reviewable by this Board.

Section 102 of NEPA requires that an EIS address alternatives to the proposed action. The several courts have held that the study need not include fanciful alternatives or alternatives which are only remote and speculative possibilities which cannot be meaningfully explored. However, disapproval of the respective APDs was, and remains, an option which should have been considered. The failure to study this alternative produced an EIS which is inadequate to support the decision to allow the Bear Thrust APD. Therefore, that decision must be vacated.

Nevertheless, the Board finds that in all other respects the EIS is an adequate, viable, even commendable work. To serve as the basis of a proper decision, it need only be supplemented by a comprehensive study of the effects of a determination to disapprove drilling on the selected site or elsewhere on the Bear Thrust Unit leases affected by the suspension order. 6/

Due to jurisdictional limitations, this Board cannot order the participation of the Forest Service in the preparation of such a supplement, nor can this decision reverse, modify, or in any way amend any decision heretofore made by personnel of the Department of Agriculture. Upon remand of the matter it shall be the responsibility of BLM to consult with FS to ascertain how best to proceed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, approval of the

6/ Of course, the Board would expect that where the interdisciplinary studies yielded recommendations which were omitted from the EIS because the "no action" alternative was thought to be unavailable, they would now be incorporated in the supplemented EIS.

application for permission to drill and the "record of decision" dated May 14, 1982, and signed by Robert Chase, are hereby vacated, and the case is remanded to the Wyoming State Office, BLM, for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

James L. Burski
Administrative Judge